



**Karimi v Taipan Property Management Limited (Environment & Land  
Case 23 of 2019) [2023] KEELC 17123 (KLR) (26 April 2023) (Judgment)**

Neutral citation: [2023] KEELC 17123 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS  
ENVIRONMENT & LAND CASE 23 OF 2019**

**A NYUKURI, J  
APRIL 26, 2023**

**BETWEEN**

**DAVID KAHURIA KARIMI ..... APPLICANT**

**AND**

**TAIPAN PROPERTY MANAGEMENT LIMITED ..... RESPONDENT**

**JUDGMENT**

**Introduction:**

1. On 6<sup>th</sup> March 2019, vide an Originating Summons of even date, the Applicant in this suit sought the following orders;
  - i. A declaration that the Applicant is entitled to be registered as the indefeasible owner of that property known as Land Reference Number 337/850 (I.R Number 71895) as registered in the name of the Respondent by virtue of adverse possession in terms of Sections 7, 13, 37 and 38 of the *Limitation of Actions Act* Cap. 22 Laws of Kenya, on account of his continued and uninterrupted possession, occupation and notorious use of the suit property for a period of more than thirty (30) years.
  - ii. A declaration that such interests, rights, estate and/or title, if any, that the Respondent had in the suit property namely Land Reference 337/850 (I.R. Number 71895), were extinguished upon expiry of twelve (12) years from 1989 with the result that no interest, right, estate or title to the suit property could be legally claimed or transferred to the Respondent in view of the provisions of Sections 7, 13, 37 and 38 of the *Limitation of Actions Act* Cap. 22 Laws of Kenya.  
In the alternative, and without prejudice to the foregoing, a declaration that the Respondent's leasehold interest on the suit property was extinguished upon expiry of twelve (12) years from 21<sup>st</sup> December 2006 with the result that no interest, right, estate or title to the suit property



could be legally claimed or transferred to the Respondent in view of the provisions of Sections 7, 13, 37 and 38 of the *Limitation of Actions Act* Cap. 22 Laws of Kenya.

- iii. An order be issued directing the Respondent to execute and hand over documents, the title deed and application for consent in respect of the suit property in favour of the Applicant, failing which the Deputy Registrar of this Honorable Court be empowered and authorized to execute the documents in favour of the Applicant.
  - iii. An order be issued authorizing the Registrar of Titles to rectify the Register and enter the name of the Applicant as the registered proprietor of the suit property for the unexpired term of the lease.
  - iii. An order of permanent injunction be issued restraining the Respondent whether by themselves, agents, servants or by any other persons whomsoever, from offering for sale, selling, transferring (other than to the Applicant), charging, leasing, assigning, disposing, advertising or in any other manner whatsoever dealing with the suit property, namely Land Reference Number 337/850 (I.R Number 71895).
  - iii. An order of permanent injunction be issued restraining the Respondent whether by themselves, agents, servants or by any other persons whomsoever, from trespassing upon, evicting, developing, building upon, damaging, wasting, utilizing or in any manner whatsoever from interfering with the Applicant's possession and occupation of the suit property namely Land Reference Number 337/850 (I.R. Number 71895).
  - iii. The cost of this summons be borne by the Respondent.
2. The summons is based on grounds on the face of it and supported by the affidavit of David Kahuria Karimi, the Applicant, who deposed that he had been in open, continuous, exclusive and uninterrupted occupation and possession of Land Reference NO.337/850 (I.R No.71895) measuring 0.8129 hectares and situated at Athi River along Mombasa Road (hereinafter referred to as the suit property), from the year 2004. He deposed that his mother-in-law had been in possession of the suit property from 1989 until her demise in 2004 when he took over occupation and possession. He further stated that no one has ever laid any claim to the suit property at any point from 1989 or even after 2004 and that he had been cultivating the parcel to feed his family and that in 2018, he let out a part of it to one Evans Sanja Omose.
  3. The Applicant further deposed that sometimes in 2019, a certain lady claiming to have been sent by the Respondent came to the suit property but failed to properly introduce herself or produce any documents to support her claims. That since then, he did receive threats on and off until on 26<sup>th</sup> February 2019 when a group of people including surveyors came to the suit property claiming to have been sent by the Respondent to erect beacons on the suit property but that the Applicant denied them from proceeding. He averred that a member from the group even asked him how much money he wanted to be paid for the years he has been on the suit property but the Applicant declined and called the area chief to intervene, when the group left with threats of evictions. He attached a certified copy of title and photographs of the suit property.
  4. The summons is opposed. The Respondent filed a replying affidavit on 24<sup>th</sup> February 2021 sworn by one Amin Premji, a shareholder and director of the Respondent company. He deposed that the Respondent, a land buying company is the registered owner of the suit property, which they purchased from Rafiki Enterprises Limited on or about 15<sup>th</sup> July 2006 and had the same transferred to themselves. He averred that as per their sale agreement, the Respondent was to acquire vacant possession of the suit property upon payment of the purchase price and that they did inspect the property and confirmed



- that the same was vacant before paying for it. He stated that the company also purchased other adjacent parcels and has even sold part of it to other companies as their main business is to benefit from the margins.
5. The deponent also stated that the Respondent had contacted a valuer in 2009 who visited the suit property and confirmed that the same was vacant and unoccupied and further submitted a formal report.
  6. The Respondent further deposed that it has received several offers from potential buyers but the same has been hampered by existence of this suit and other fraudsters who frequent the area to frustrate the registered owners of land in the region. He emphasized that the Applicant had admitted to the fact that agents of the Respondent have been frequenting the suit property until he denied them access and that therefore the applicant does not qualify for the claim by adverse possession but is merely attempting to procure title to the suit property by fraudulent claims. He stated that as the suit property is open and is situate along Mombasa Road, the same is used by truckers and other transporters to temporarily park their vehicles. He attached copies of the sale agreement, a transfer document dated 14<sup>th</sup> November 2006, a grant, and a valuation report dated 19<sup>th</sup> May 2009.
  7. The suit proceeded to a full hearing with both the Applicant and the Respondent testifying in court to support their respective cases.

### **Applicant's Evidence**

8. PW1, David Kahura Karimi, testified on 2<sup>nd</sup> March 2021. He adopted his affidavit in support of the Petition sworn on 2<sup>th</sup> March 2019 as well as his witness statement dated 26<sup>th</sup> November 2019 as his evidence in chief. He produced a copy of the title for the suit property and two photographs that he had annexed to his affidavit. It was his evidence that his mother-in-law one Phoebe Mbulwa had been cultivating the suit property since 1989, and upon her demise in 2004, he took over and continued to cultivate the parcel every season including hiring tractors to till the land. That he had been planting several crops including maize, beans and vegetables which he has been selling to retailers. He further stated that he has educated all his children from the proceeds of the suit property and has invested heavily on the land including taking a loan facility in 2016 to help lay pipes for irrigation during the dry seasons. He stated that he had also leased a portion of the land to one Evans Sanja who sells tractors and spare parts. He deposed that from the year 1989 when they cultivated the suit property with the mother-in-law, and past 2001 when he took over the cultivation, they had enjoyed open occupation and farming on the land without anyone laying a claim on the same until the year 2019 when the said invasion by the Respondent was attempted.
9. Upon cross-examination, he confirmed that he had conducted a search in 2018 and that there was another case over ownership of the suit property in Mavoko where he had been sued by one "Telaso", but who later withdrew the case. He also stated that he had not leased the land but works on it with someone else. He stated that he does not live on the suit property but was cultivating the same.
10. PW2 was Sammy Kiiro Munguti. He adopted his statement dated 26<sup>th</sup> November 2019 as his evidence in chief. According to him, he had been ploughing the suit property for payment using his brother's tractor, since 1989 up to 2001 and that he knew that the land belonged to Phoebe Mbulwa and her family. On cross examination, he stated that there was no building on the land when he used to cultivate it.
11. PW3 was Stephen Muema Kiiro. He adopted his statement as his evidence in chief. He confirmed that PW2 was his father. He stated that he ploughed the suit property on diverse dates between 2004 and



2008 and that he knew the land belongs to the Applicant. On cross examination he stated that he was ploughing the suit property using his uncle's tractor.

12. PW4 was John Mutiso Matheka, who adopted his witness statement dated 28<sup>th</sup> May 2021 as his evidence in chief. He stated that he had been the Assistant Chief of Ngelani Sublocation of Athi River Location since 1996 to 2017. He stated that he knew Phoebe Mbulwa who used to cultivate the suit property some time with no one else laying claim over the property for the entire period he was an Assistant Chief. In cross examination, he stated that he knew of Phoebe Mbulwa using the suit property even before he became the Assistant Chief and that there was no case concerning the land. He further stated that he never saw any business being done on the land. He stated that the only complaint he dealt with on the land was a boundary dispute. That marked the close of the Applicant's case.

### **Respondent's Evidence**

13. DW1 was Amin Premji, a director and shareholder of the Respondent. He adopted as his evidence in chief, the replying affidavit sworn on 23<sup>rd</sup> February 2021 and filed in response to the Originating Summons. He produced a copy of the sale agreement, a transfer document dated 14<sup>th</sup> November 2006, a grant, and a valuation report dated 19<sup>th</sup> May 2009. He stated that their company, which operates the business of buying and selling land, had bought the suit property from Rafiki Enterprises in 2006 with intention to sell it. Further that at the time of purchase the property was unoccupied and that they offered the properties for sale. It was his testimony that the Respondent had purchased 3 parcels of land and had successfully sold the other two to a Chinese company and that the suit property was the remaining parcel, which the agents attempts to sell had been hampered by this suit. He denied the Applicant's assertion that he had been in occupation of the suit property. He stated that he even accompanied the valuer to the land in the year 2009 and that the report showed that the land was unoccupied. He stated that he instructed agents to sell the land around 2014 – 2015 when they found the Applicant had encroached on the suit property as they had put up a fence, placed tractors on the land and had occupied one acre.
14. On cross examination, he stated that it was not true that at the time of purchase the Applicant was in possession of the suit property. He stated that he has been paying land rates and rents. He stated that he did not take any steps to wade off encroachers, place guards thereon or fence the property. He stated that as of 2016 when he instructed the agents to sell his land there were no structures on the land. That marked the close of the defence case.
15. Parties were directed to file written submissions in support of their respective cases. On record are the Applicant's submissions filed on 1<sup>st</sup> September 2022. No submissions were filed by the Respondent.

### **Applicant's Submissions**

16. Counsel for the Applicant placed reliance on provisions of section 7(d) of the *Land Act* No. 6 of 2012, section 28 (h) of the *Land Registration Act* No. 3 of 2012 and sections 7, 13 (1), 17 and 38 (1) of the *Limitation of Actions Act* Cap 22 Laws of Kenya to argue that a registered proprietor's title is extinguished at the end of 12 years if the land has been in continuous possession of another person.
17. Counsel referred to the case of *Adnam v Earl of Sandwich* [1877] 2QB 485 for the proposition that where, by default or negligence, a proprietor fails to assert their rights for a long time allowing others to take possession their property, it would be inequitable to let them disturb the long occupation of the person in adverse possession.
18. Counsel also cited the case of *Pina Waithera Kamau v Shmina Mandal & Another* [2021] eKLR and submitted that to prove adverse possession, there must be evidence of peaceful and uninterrupted



possession as of right of the disputed property and the owner must have been dispossessed of the property. They further submitted that although the Respondent purchased the suit property in 2006, the purchase was void since the seller's rights to the suit property had already been extinguished by virtue of adverse possession. To buttress this contention, they cited the case of *Chevron (K) Ltd v Harrison Charo Wa Shutu* [2016] eKLR for the proposition that adverse possession is a fact that is observed on the land and not seen in the title as a man who buys land without ascertaining who is in occupation risks his title.

19. It was contended for the Applicant that the Applicant's witnesses who were his neighbours proved that the applicant had been in active possession of the suit property before and after 2004. According to counsel, the Respondent had failed to inspect the suit property and admitted that in 2016 he saw structures on the land. Relying on the reasoning in the cases of *Peter Kamau Njau v Emmanuel Charo Tinga* [2016] eKLR, and *Guthu v Ndeete* [1984], it was further submitted for the Applicant that no step was taken by the Respondent to assert their rights when they realised in 2016 that there were structures on the suit property, thereby failing to stop time from running.
20. As regards the valuation report produced by the Respondent, counsel submitted that the same had no probative value as it was not produced by the author thereof. Counsel maintained that the Applicant having enjoyed uninterrupted possession of the suit property from 2004 to 2019, has demonstrated that he is entitled to the same under the doctrine of adverse possession.
21. Further reliance was placed on the cases of *Wambugu v Njuguna* [1983] KLR 172, *Moraa Ndege v Moenga Moenga* [2015] eKLR and *Isaac Cypriano Shingore v Kipketer Togom* [2016] eKLR; all of which the court has considered.
22. In conclusion, counsel submitted that the Applicant had met the threshold for grant of rights over the suit property by adverse possession in that he had occupied the land openly, without force, without license or permission of the owner and with the intention to own the land.

### **Analysis and determination**

23. I have carefully considered the pleadings, evidence and submissions. In my considered view, the sole issue that arise for determination is whether the Applicant is entitled to the suit property by the doctrine of adverse possession.
24. A claim for land under the doctrine of adverse possession is a claim based on *limitation of Actions Act*.

Section 7 of the *Limitation of Actions Act* provides that;

An action may not be brought by any person to recover land after the end of 12 years from the date on which the right of action accrued to him, or if it first accrued to some person through whom he claims, to that person.

Section 13 provides as follows;

1. A right of action to recover land does not accrue unless the land is in possession of some person in whose favour the period of limitation can run (which possession is in this Act referred to as adverse possession), and, whereunder Section 9, 10, 11 and 12 of this Act a right of action to recover land accrues on a certain date and no person is in adverse possession on that date, a right of action does not accrue unless and until some person takes adverse possession of the land.
2. Where a right of action to recover land has accrued and thereafter, before the right is barred, the land ceases to be in adverse possession, the right of action is no longer taken to have accrued,



and a fresh right of action does not accrue unless and until some person again takes adverse possession of the land.

3. For the purposes of this Section, receipt of rent under a lease by a person wrongfully claiming, in accordance with Section 12(3) of this Act, the land in reversion is taken to be adverse possession of the land.

Section 17 states as follows;

Subject to Section 18 of this Act, at the expiration of the period prescribed by this Act for a person to bring an action to recover land (including a redemption action), the title of that person to the land is extinguished.

Section 38 (1) and (2) provides as follows;

1. Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in Section 37 of the Act, or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land.
  2. An order made under subsection (1) of this Section shall on registration take effect subject to any entry on the register which has not been extinguished under this Act.
25. Essentially, a claim under adverse possession is a claim based on a continuous and or uninterrupted possession of land by a person who is not the owner thereof and who does not have the owner's permission to be on such land, and where the true owner, despite being aware of the trespasser's possession, fails to take any legal action against such unpermitted possession for a period of 12 years, thereby extinguishing the true owner's title. The continuous possession must be so clear as to dispossess the true owner of the land and it must be open and without force for the entire period of 12 years.
26. The basis for the doctrine of adverse possession is to bar owners of property who, by negligence, default or otherwise, have failed to assert their rights of ownership thereof for a period of twelve years, in the face of open, notorious and continuous possession by a trespasser; so that it would be against the tenets of equity to interfere with the trespasser's possession and it would only be just to have the trespasser declared the owner in the place of the true owner.
27. In the case of *Chevron (K) Ltd v Harrison Charo Wa Shutu* [2016] eKLR the Court of Appeal in discussing the object of the Limitation statute cited with approval the case of *Adnam v Earl of Sandwich* [1877] 2 QB 485 where it was held as follows;
- The legitimate object of all statutes of limitation is in no doubt to quiet long continued possession, but they all rest upon the broad and intelligible principles that persons, who have at some anterior time been rightfully entitled to land or other property or money, have, by default and neglect on their part to assert their rights, slept upon them for a long time as to render it inequitable that they should be entitled to disturb a lengthened enjoyment or immunity to which they have in some sense been tacit parties.
28. To prove adverse possession, the applicant must demonstrate uninterrupted, exclusive and open possession of the land, without the owner's permission for a period of 12 years. In the case of *Richard Wefwafwa Songoi v Ben Munyifwa Songoi* [2020] eKLR, the Court of Appeal stated that for a person to establish adverse possession, they must establish the following
- a. On what date he came into possession.
  - b. What was the nature of his possession?



- c. Whether the fact of his possession was known to the other party.
  - d. For how long his possession has continued; and
  - e. That the possession was open and undisturbed for the requisite 12 years.
29. In *Wambugu v Njuguna*, [1983] KLR 173, the Court of Appeal held that adverse possession contemplates two concepts: possession and discontinuance of possession. It was further held that the proper way of assessing proof of adverse possession is whether or not the title holder has been dispossessed or has discontinued his possession for the statutory period, and not whether or not the claimant has proved that he or she has been in possession for the requisite number of years.
30. Similarly, in the case of *Samuel Kihamba v Mary Mbaisi* [2015] eKLR, the Court of Appeal stated as follows;
- Strictly, for one to succeed in a claim for adverse possession one must prove and demonstrate that he has occupied the land openly, that is, without force, without secrecy, and without license or permission of the land owner, with the intention to have the land. There must be an apparent dispossession of the land from the land owner. These elements are contained in the Latin phraseology, *nec vi, nec clam, nec precario*. The additional requirement is that of *animus possidendi*, or intention to have the land.
31. In the instant matter the Applicant's testimony was that his mother-in-law had been in possession of the suit property since 1989 to 2004 when she died and that he took over possession in 2004 till 2019 when he filed this suit due to threats of eviction. The Respondent confirmed the Applicant's possession of the suit property but asserted that the Applicant entered the suit property in the year 2016. Therefore, this dispute turns on when the Applicant took possession of the suit property as the claim of adverse possession is based on time limitation of twelve years.
32. It is trite law that whoever alleges must prove. Therefore, the burden of proof in respect to the date of the Applicant's entry on the suit property rests on the Applicant. While the Applicant together with his neighbours and Area Assistant Chief all testified to one thing that the Applicant began possession of the suit property in 2004, the Respondent produced a valuation report dated 19<sup>th</sup> May 2009, which showed that the suit property was as of that date vacant. The Applicant discredited the report on grounds that it was not produced by the author thereof. However, at the hearing no objection was raised on the production of the report, which report was produced by the Respondent's director.
33. I have considered the testimony of the Applicant and apart from his word and that of his witnesses, there is no evidence to demonstrate that he took possession of the suit property in 2004 as alleged or at all. In my view, a mere allegation by the Applicant and his witnesses that he took possession of the suit property in 2004, without substantive proof, is not sufficient evidence of the date of the Applicant's entry on the suit property. Evidence is not manifest in the multitude of witnesses, but in the satisfactory proof of the alleged fact on the standard required in law. This is because the valuation report by the Respondent dated 19<sup>th</sup> May 2009, was clear in the description of the suit property as well as in the attached photographs that showed that the suit property was vacant with no marked boundaries as of the date of the report. The evidence in the report was not in any way rebutted or challenged in cross examination or at all. Confronted with the evidence in the valuation report, for the Applicant to succeed in his claim, he was obligated to, but failed, to produce any other evidence to counter the evidence in the valuation report. Section 108 of the *Evidence Act* places the burden of proof in a suit on the person who would fail if no evidence at all were given on either side. I am therefore not convinced that the Applicant took possession of the suit property before 2009.



34. The Respondent's witness testified that their business was buying and selling land and in cross examination stated that they were in possession of the land until 2016 when they found encroachments thereon. They conceded that they had neither fenced the land nor placed guards thereon. In my view, just because the Respondent did not fence the suit property or assign guards thereon was not in itself an open cheque to all and sundry to lay claim on the land. There is nothing wrong with not fencing or not placing guards on one's land. Being in possession does not mean an owner of property must construct on the property. A person can still be in possession of their property even when it has no fence or guards. Even periodical visits of one's property is sufficient proof of possession thereof, because the possession of an owner does not have to meet the threshold of an adverse possessor. In any event, the Respondent's position was that the intention of purchasing the suit property was to sell it later at a profit and therefore just because they were not using their property cannot in itself be proof of adverse possession by the Applicant. In the case of the Respondent who was selling the suit property, it could not be expected that they would construct on or be in active use of the land.
35. My view is fortified by the reasoning in the case of *Alfred Welimo v Mulaa Sumba Barasa*, CA No 186 of 2011, where the Court of Appeal expressed itself as follows;
- It is trite that adverse possession is not established merely because the owner has abandoned possession of his land and ceased to use it; for as Robert Megarry aptly observed in his *Megarry's manual of the Law of Property*, 5th ed. page 490, the owner may have little present use for the land and that land may be used by others, without the users demonstrating a possession inconsistent with the title of the owner. So the mere fact that the appellant abandoned possession of the suit property and went to live at Ndalu scheme by and of itself does not establish adverse possession. The abandonment of possession must be coupled with the respondent taking possession of the land with *animus possidendi* (the intention to possess) and asserting thereon rights that are inconsistent with those of the appellant as the owner of the land....
36. I believe the Respondent's evidence contained in the valuation report that as at 2009, the suit property was vacant and there was no evidence of possession by the Applicant.
37. To prove that the applicant is entitled to land by adverse possession they must establish continuous, exclusive, open and notorious possession for 12 years. I note that this suit was filed on 6<sup>th</sup> March 2019. To achieve the 12year period, it was upon the Applicant to demonstrate by cogent evidence that he took possession of the suit property before March 2007. For the reasons given above, I find and hold that the Applicant failed to demonstrate that he entered the suit property in 2004.
38. In any event, the Applicant's evidence that he was tilling the suit property but had not put any structure on the land, in my view, did not in any way dispossess the Respondent of the suit property as they were not interested in using the land but only interested in selling it. I say so because the Applicant's actions were not inconsistent with the Respondent's possession. Besides, the Applicant cannot claim to have been in possession of the land peacefully as he admitted that there was a suit against him in Mavoko.
39. In the premises, I find and hold that the Applicant has failed to prove his claim on the required standard and the same is hereby dismissed with costs to the Respondent.
40. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 26<sup>TH</sup> DAY OF APRIL, 2023 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM**

**A. NYUKURI**

**JUDGE**



**In the Presence of;**  
**Ngaruiya for Plaintiff/Applicant**  
**No appearance for defendant**  
**Ms Josephine – Court Assistant**

